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No. 534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

NATIONAL THEATRES CORPORATION,
Petitioner,

v.

BERTHA BUILDING CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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January 20, 1960.

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The second reason why the respondent urges that a writ for certiorari to review the judgment of the Court of Appeals for the Second Circuit herein should not issue is the alleged interlocutory nature of the judgment below which is a judgment that the respondent's cause of action is not barred by the New York Three-Year Statute of Limitations (Section 49(3) New York Civil Practice Act.)

The rule requiring finality as a condition to review applies only to a review by a Court of Appeals of an order of the District Court (Section 1291, Title 28 U. S. C.) and has no application to a review by this Court of cases arising in the Court of Appeals (Section 1254(1), Title 28 U. S. C.). Historically, this Court has granted writs of certiorari when the decision of the lower court was interlocutory. *Farrington* v. *Tkushige*, 273 U. S. 284 (1927), *Cobbledick* v. *United States*, 308 U. S. 548 (1939); see *McCullough* v. *Cosgrave*, 309 U. S. 634 (1939) and *DeBeers Mines* v. *United States*, 325 U. S. 212 (1944).

This case fulfills the requirement of extraordinary circumstances because petitioner is asking this Court to pass on the question of the applicable statute of limitations to this action.

A determination by this Court that the action is covered by the New York Three-Year Statute of Limitations will avoid extended litigation by the parties on the numerous factual and legal issues presented by the case. *U. S. Alkali Ass'n* v. *U. S.*, 325 U. S. 195.

Moreover, this case arises under the newly enacted Interlocutory Appeals Act which permits, at the discretion of the district court and the Court of Appeals, a review by the Court of Appeals of an interlocutory order of the district court (28 U. S. C., Section 1294(b)).

When the district court has made the necessary certificate, and the Court of Appeals has granted leave for appeal, as here, it follows that this Court has the jurisdiction to review the determination of the Court of Appeals just as in any appeal to such an appellate court, and that its discretion to review the determination of the Court of Appeals should be exercised as in any other case. Appropriate grounds for such review are set forth with petition.

Respectfully submitted,

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